

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-6161⁷⁻⁷⁷
DOCKET NO. 77- 6161

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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LLEWELYN S. BAILEY,

Plaintiff - Appellant,

v.

VETERANS ADMINISTRATION,

defendant - Appellee.

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NOV 7 1977

Civil Action NO. 76 Civ. 5381 (LFM)

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Appeal From The United States District Court
For The Southern District Of New York

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~~APPENDIX~~
BRIEF FOR APPELLANT

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- (1) That Appellant basic due process was violated : Not knowing that a complaint was lodged against him until the 4th. June 1976 some (3) three weeks later when I was asked by Chief Hospital Police Siley to accompany him to the Chief of engineers office where I was served a written notice suspending me for (5) five days pending investigation of alleged striking of a visitor. See transcript page #4 para 19-25 also page #163 para 2-21.
- (2) At the "FEAA" hearing Mr. Frosetta Administration representative continued to ask leading question of witness. Page #14 para 8-9 and 14-15.

PAGINATION AS IN ORIGINAL COPY

- (3) Witness Mr. Schwartz insisted that my back was turned when I spoke to them. I wonder how could I see them if my back was turned. See page #12 para 5-6 also page #11 para 19-20.
- (4) Witness Mr. Schwartz testify that when he first entered office the shade was down covering glass top. See page #16 para 3-4 and at another stage he said that the shade was up. See page #38 para 3. Then on page #78 para 23-24 witness Kaswan said that he could see through door then later shade was pulled down and his view was blocked.
- (5) On the evening Of 5/14/76 Mr. Schwartz did not tell anyone including Parker (the friendly officer) or Mr. Kaswan that he had been hit or struck. On page #22 para 19-24 Mr. Schwartz testify that his face was swollen for (2) two weeks and he had several bruises on his upper arm yet no one saw these bruises and swelling, not even his close friend Mr. Kaswan nor the investigating officer Chief Siley. Mr. Schwartz did not seek medical aid which was available at the hospital.
- (6) Mr. Schwartz testify that at his house that same night he wrote a statement then on page #58 para 12-20 he changed to notes when he was asked by appellant attorney to produce that statement. (Note) "FEAA" Hearing Officer refused that request.
- (7) Mr. Schwartz was not the one to report incident to Administration it was his friend Mr. Kaswan. See page #60 para 8-14.
- (8) That summonses issued to Mr. Schwartz were voided before the true facts were established. See page #60 para 22-23. This was even before he met with Administration on the 3rd. June 1976.
- (9) There is nothing in Mr. Kaswan testimony indicating that he said to Officer Parker O:god did you see him hit my friend as Officer Parker stated. See page 115 para 2-7. All Mr. Kaswan said, for gods sake what,s the matter with you guys. See page 79 para 11-12 also page 99 para 3-8.
- (10) I know of a fact that Officer Parker does not like me. He said so openly over and over before and I know that he would do or say anything that would get me fired. He even stated his dislike for me at the "FEAA" hearing. See page #143 para 1-25 also page #144 para 1-22.
- (11) There was conflict in the testimony of Mr. Kaswan and Schwartz concerning Appellant,s position when the alleged striking of Mr. Schwartz. Schwartz said Appellant was perpendicular to the door while Kaswan said Appellant had his back to the door. See page 100 para 15-16.
- (12) Officer Parker testify that he separated Schwartz and Bailey but on page #21 para 3-5 Mr. Schwartz cannot recall.

(13) Mr. Schwartz testify that he tried to office door yet his friend Mr. Kaswan who claimed that he was sitting in front of desk facing door didnt see same. Page #100 para 17-20.

(14) That Chief Siley the investigating officer had ample time to contact patient Kaswan while he was still in hospital but failed to do so. Patient was not discharged until the 24th. May 1976. See page #158 para 10-24.

(15)

CONCLUSION

As far as this case goes its the truth one should be interested in. As an Hospital Police Officer it is my duty and responsibility to see that all visitors depart hospital after visiting hours. It is also my duty and responsibility to see that all in-patients remain on their ward after visiting hours and not wonder around hospital. On page #74 para 6-9 of transcript Mr. Kaswan himself testify how weak he was so this is reason enough why he should be on his ward close to medical attention.

By asking Mr. Schwartz to depart hospital premises and Mr. Kaswan to return to his ward I was thinking about the patient welfare but it turned out that I become a victim of circumstance. The Administration failed to established a case beyond reasonable doubt.

Judge MacMAHON did not hear testimony in this case. All he did was merely read parts of the transcript.

For the reasons set forth above, the decision should be reversed in all respects or the case should return to Judge MacMAHON so that he can hear testimony.

Respectfully submitted,

Llewelyn S. Bailey

Llewelyn S. Bailey,
645E 14th. Street,
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(212) 674- 4902

DATED:- 11/2/77

CERTIFICATE OF SERVICE

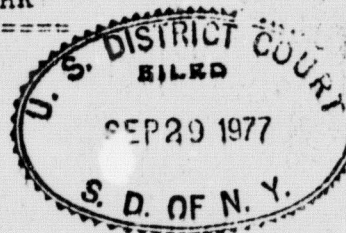
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I Llewelyn S. Bailey (Appellant) hereby certify that I have served (2) two copies of foregoing Brief upon the United States Attorney for the Southern District of New York Attorney for defendant by causing copies of same to be deposited in the U. S. Mail, postage prepaid, addressed to them, this 3rd. day of November 1977.

Llewelyn S. Bailey
=====

Llewelyn S. Bailey.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



LLEWELYN S. BAILEY,
PLAINTIFF,

V.

VETERANS ADMINISTRATION,
DEFENDANT.

DOCKET NUMBER 76 CIV. 5381

MR. L. E. MAC MAHON
(DISTRICT COURT JUDGE)

NOTICE OF APPEAL

Notice is hereby given that LLEWELYN S. BAILEY appeals to the United States Court of Appeals for the Second Circuit from the Judgement that removal action is affirmed and motion therefrom is denied entered in this action on the 31 st. day of August 1977.

Llewellyn S. Bailey
LLEWELYN S. BAILEY

Date- 9/29/77

645 E 14 Street,
New York. New York. 10009.
Phone Number= (212) 674-4902.

TO:- ADMINISTRATOR
VETERANS ADMINISTRATION
408 FIRST AVENUE
NEW YORK, N.Y. 10010

ROBERT B. FISKE, JR.
UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
ATTORNEY FOR DEFENDANT.

Court Report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
LLEWELYN S. BAILEY,

Plaintiff,

-against-

VETERANS ADMINISTRATION,

Defendant.
-----x

:
: Pro Se

: 76 Civ. 5381 (LFM)

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: MEMORANDUM
:

MacMAHON, District Judge.

This is an appeal from a decision of the Civil Service Commission Federal Employee Appeals Authority ("FEAA"), which affirmed a decision by defendant Veterans Administration ("VA") removing plaintiff from his position as a Hospital Supervisory Police Officer at defendant's hospital in New York City. Plaintiff moves and defendant cross-moves for summary judgment, pursuant to Rule 56, Fed.R.Civ.P.

*
Plaintiff, appearing in this court pro se, has failed to particularize the relief requested. His "motion," however, may fairly be construed as one seeking summary judgment, and we so treat it.

We deny plaintiff's motion, grant defendant's cross-motion, and dismiss the action.

There was substantial evidence at the administrative level to establish the following facts:

Plaintiff was a Hospital Supervisory Police Officer in a VA hospital. On the evening of May 14, 1976, a patient, Joseph Kaswan, was visited by one Harold S. Schwartz. Schwartz stayed past visiting hours. A nurse told him to leave, and he went to the lobby, accompanied by Kaswan, who was in a wheel chair. Plaintiff was on duty in the lobby, and he also told Schwartz to leave.

Schwartz testified that plaintiff's statement to him and Kaswan was inaudible; that plaintiff refused to repeat it but grabbed Schwartz by the arm, took him to an adjacent office, and issued a summons. Once inside the office, the door was closed and a shade was drawn. Schwartz rose from his chair, proceeded to the door to address Kaswan, and plaintiff punched him in the jaw. Kaswan testified that he saw the punch, and both Schwartz and Kaswan testified that plaintiff's elbow struck the shade, causing it to fly up immediately

before plaintiff hit Schwartz. Officer Parker, plaintiff's co-worker, testified that he heard Kaswan shout, "Oh my God. He's hitting my friend." Parker also testified that he saw that the shade was up at that time. Plaintiff denied striking Schwartz and testified that he merely issued the summonses and gave them to Schwartz, who thereupon departed.

Our function on this appeal is limited. We do not sit as a "Super Civil Service Commission . . . reviewing the substantive merits of government personnel decisions." Gilbert v. Johnson, 419 F. Supp. 859, 885 (N.D. Ga. 1976). Cf. Bishop v. Wood, 426 U.S. 341, 349-50 (1976). On the contrary, our inquiry is restricted to: (1) whether appropriate procedures were followed in the administrative proceedings; and (2) whether the administrative decision is supported by substantial evidence in the record and was not arbitrary, capricious or an abuse of discretion. See McTiernan v. Gronouski, 337 F.2d 31, 34 (2d Cir. 1964); Capolino v. Kelly, 236 F. Supp. 955, 956 (S.D.N.Y. 1964), aff'd mem., 339 F.2d 1023 (2d Cir.), cert. denied, 382 U.S. 858 (1965).

In the instant case, it seems clear that the applicable procedures, set forth in 5 U.S.C. § 7501 (1967) and 5 C.F.R. § 752 (1977), were followed. As mandated by these provisions, plaintiff received written notice of the proposed termination thirty days before termination took effect. The notice stated the reasons for the proposed termination, informed plaintiff of his opportunity to examine the evidence upon which the removal would be predicated, and advised him of his opportunity to answer the charges. A second notice, forwarded to plaintiff after the VA's adverse decision, advised plaintiff of the reasons for his dismissal and of his right to appeal.

In light of the foregoing, we can only conclude that proper procedures were followed and that, contrary to plaintiff's contentions, he was not denied procedural due process.

Noting the conflicting evidence, the absence of medical testimony concerning Schwartz's injury and the fact that the testimony against him came from interested witnesses, plaintiff further contends that the administrative decision is not supported by substantial evidence. These objections, however, are not well taken, inasmuch

as they attack merely the credibility of the witnesses and the weight to be accorded to the evidence, matters resolved against plaintiff by the FEAA. We cannot say that the agency acted arbitrarily in crediting Schwartz and Kaswan while failing to credit plaintiff. The evidence supporting the agency's decision, moreover, is certainly substantial. The testimony of Schwartz and Kaswan was sufficient to establish the charges against plaintiff and was corroborated in significant respects by Officer Parker. Plaintiff's attempts to impeach the credibility of these witnesses and otherwise to contradict them did no more than raise an issue of fact for the FEAA's determination ~~was~~ resolved against plaintiff below.

We conclude, therefore, that the FEAA's decision is based on substantial evidence and is not arbitrary, capricious or an abuse of discretion.

We have reviewed plaintiff's other contentions and find them without merit.

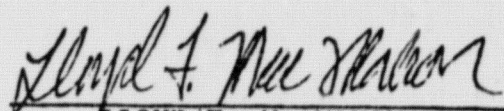
Accordingly, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary

judgment is granted; and the action is dismissed.

So ordered.

Dated: New York, N. Y.

August 31, 1977

A handwritten signature in cursive script, reading "Lloyd F. MacMahon", written over a horizontal line.

LLOYD F. MacMAHON
United States District Judge

Llewelyn S. Bailey pro se
645 East 14th Street
New York, N.Y. 10009

Robert B. Fiske, Jr. U.S. Atty
1st An Census Bldg
NYC - 11994

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

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PLAINTIFFS

DEFENDANTS Judge MacMahon

BAILEY , LLEWELYN S.

VETERANS ADMINISTRATION

9/29

CAUSE

Conflicting Statements and lack of corroboration.

ATTORNEYS

